STATE OF MICHIGAN

COURT OF APPEALS

HERMAN JONES,

Plaintiff-Appellant,

and

TODD WILLIAMS,

Plaintiff,

v

CITY OF LANSING,

Defendant-Appellee.

UNPUBLISHED
July 28, 2011

No. 297161
Ingham Circuit Court
LC No. 05-001090-CZ

Before: METER, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

Plaintiff Herman Jones appeals as of right from the trial court's order granting summary disposition to defendant. We affirm.

Jones, a black man, was employed with the Lansing Police Department (LPD) and filed a complaint alleging various acts of racial discrimination and retaliation. The trial court granted summary disposition to defendant under MCR 2.116(C)(10).

We review de novo a trial court's decision granting a motion for summary disposition. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994).

> A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment or partial summary judgment as a matter of law. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. The opponent must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. The trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence presented. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue

> upon which reasonable minds might differ. [*Michigan Mut*, 204 Mich App at 85 (citations omitted).]

Jones first argues that the trial court improperly dismissed his claim of disparate treatment. MCL 37.2202 provides that an employer shall not

> [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

"In some discrimination cases, the plaintiff is able to produce direct evidence of racial bias. In such cases, the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). "In many cases, however, no direct evidence of impermissible bias can be located. In order to avoid summary disposition, the plaintiff must then proceed through the familiar steps set forth in [*McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973)]." *Hazle*, 464 Mich at 462. Jones does not dispute that the *McDonnell Douglas* framework applies to his claim.

Under the *McDonnell Douglas* framework, and in accordance with the facts of this case, Jones, to survive a summary-disposition motion, must have initially demonstrated that (1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) he suffered the adverse action under circumstances giving rise to an inference of unlawful discrimination. See *id*. at 463.

Jones satisfied element 1 by virtue of his race. He satisfied element 2 by being the subject of Internal-Affairs complaints.[1] Additionally, the parties do not dispute that Jones was qualified to be a police officer, thus satisfying element 3. The trial court found that plaintiff failed to satisfy element 4 because he "failed to demonstrate that he was treated differently than other officers of a different class for the same conduct." Jones takes issue with this finding. He claims that the so-called "Curry Report" sufficed to raise the inference that Jones suffered the adverse employment actions because of his race.

The Curry Report arose after Jones and other minority officers (known as the "LPD 7") approached the Michigan Department of Civil Rights and the American Civil Liberties Union for assistance in addressing issues of discrimination in the LPD. The LPD hired Professor Theodore Curry in January 2004 to conduct a study entitled "An Analysis of the Discipline Process and

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[1] An Internal-Affairs complaint was filed and sustained against Jones in May 2002 for failing to "competently sort, complete and collate [a] report" and for being "insubordinate . . . in refusing to identify his field supervisor" to a sergeant. An Internal-Affairs complaint was filed and sustained against Jones in July 2003 for delaying the completion of a report and for being insubordinate to a sergeant.

Outcomes, with Recommendations, for the Lansing Police Department." According to the Curry Report, Curry "was asked to conduct an independent review of the disciplinary process and outcomes within the Lansing Police Department (LPD) and to provide recommendations on improvements that LPD might make."

Curry found that minority officers were more likely than expected by chance to have internal and external complaints lodged against them.[2] He also found, however, that once these complaints were made, there was no significant relationship between race and the likelihood that a complaint would be sustained.[3] The trial court concluded that the Curry Report did not help Jones's case, in light of the data regarding whether a complaint would be sustained.

Jones contends that the pattern concerning the lodging of internal complaints, along with the fact that his Internal-Affairs complaints arose soon after he had made complaints about discrimination in the LPD, supported element 4 of the *McDonnell Douglas* framework.

However, the Curry Report specifically noted that "the analysis of LPD discipline data **does not** provide evidence of causality. Evidence is provided of correlations only" (emphasis in original). The mere existence of the report (which prompted many changes on the part of the LPD) and the timing of the complaints against Jones were not sufficient to raise an inference of unlawful discrimination *on the part of defendant*, especially given that the complaints were in fact eventually sustained. There is no indication that defendant treated Jones unfairly in the resolution of the Internal-Affairs complaints. As noted by the trial court in its opinion:

> Aside from his reliance on the Curry Report, Plaintiff only presented unsupported allegations that other officers received more favorable treatment. Plaintiff merely alleges that he was sanctioned for poorly written reports whereas non-minority officers were not, but fails to provide any specific events to support these allegations. Further, when Plaintiff was interviewed by IA he either refused or was unable to identify any specific acts of racial discrimination or point to any specific individual who received different treatment.

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[2] The LPD, in June 2005, instituted many changes to deal with the problems identified in the Curry Report.

[3] The Curry Report did in fact conclude that minority officers had more sustained complaints against them than would be expected by chance. Even though, once a complaint was lodged, race did not play a role in the outcome of the complaint, the fact that more complaints were lodged against minorities *initially* served to raise their overall level of sustained complaints. In other words, the racial disparity arose at the level of the lodging of the initial complaint, and not at the level of the resolution of the complaint.

Even assuming, for purposes of argument, that Jones did establish a prima facie case under the *McDonnell Douglas* analysis, the evidence would still be insufficient for his case to survive a summary disposition motion. As noted in *Hazle*, 464 Mich at 464-466:

> Thus, once a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case. . . . The articulation requirement means that the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. . . .
>
> At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. . . . a plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination. [Internal citations and quotations marks omitted.]

The LPD articulated legitimate reasons for the actions taken against Jones, and Jones presented insufficient evidence that these reasons were mere pretexts for unlawful discrimination.

Jones next argues that the trial court erred in granting defendant summary disposition with regard to Jones's claim of a hostile work environment. In *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993), the Court stated:

> An examination of the Michigan Civil Rights Act reveals that there are five necessary elements to establish a prima facie case of a hostile work environment:
>
> (1) the employee belonged to a protected group;
>
> (2) the employee was subjected to communication or conduct on the basis of [race];
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> (3) the employee was subjected to unwelcome [racial] conduct or communication;
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> (4) the unwelcome [racial] conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior.

The *Radtke* Court further stated:

> [A] hostile work environment claim is actionable when the work environment is so tainted that, in the totality of the circumstances, a reasonable

> person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment. [*Id*. at 372.]

In support of his hostile-work-environment claim, Jones cites an affidavit in which he states that from late 1998 to late 2006, there was an "almost entirely black midnight shift under the only black captain at LPD" and that these officers were "commonly referenced by white officers as the . . . 'Soul Patrol;" 'Land of the Misfits;' 'Trouble Makers,' 'Problem;' 'Internal Affairs;' and 'No privilege' shift." He also cites an email to the police chief in which he states that he is "not going to feel safe/comfortable telling [Internal Affairs] anything," and he indicates that he began experiencing extreme anxiety as a result of stress.

These vague allegations do not establish a prima facie case of a hostile work environment based on race.[4] See, e.g., *Quinto v Cross & Peters Co*, 451 Mich 358, 370-371; 547 NW2d 314 (1996). Jones also cites an email an officer circulated in March 2005 stating that she wanted the "fruity officers like [Jones]" to be "weed[ed] out" and referring to the LPD 7 as the "'I'm black so I get special privileges' officers" and as the "fucked-up (not fabulous) seven." This single email was inappropriate, but there is no evidence that it should be attributed to defendant under the doctrine of respondeat superior. Indeed, there is no evidence that defendant "failed to rectify a problem after adequate notice." *Radtke*, 442 Mich at 395. In fact, the LPD, on June 1, 2005, instituted many changes in response to the Curry Report, and, according to the police chief's affidavit, "training on the new policies and procedures was held in May 2005." The changes concerned, in part, new procedures for the filing of Internal-Affairs complaints in an attempt to make the complaints more equitable. Paragraph 1 of the "summary of changes to policies and procedures of LPD" states that the LPD: "Developed 10 Core Values—Respect and fairness; integrity and honesty; Compliance with laws and LPD rules; *Value diversity*; Customer satisfaction; Teamwork; Authority and trust; Efficient resource utilization; Confidentiality of police business; Conduct that reflects positively on the Department" (emphasis added).

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[4] The trial court ruled, in part, as follows:

> . . . Plaintiff's affidavit disclosed no specific instances of racial remarks and at best the remarks alleged by Plaintiff were no more than offensive utterances from which an inference of hostile work environment might be drawn. However, Plaintiff fails to describe with particularity when, where, or how he was harassed. Although, it is recognized that a single act by an employer may so poison the environment as to constitute discrimination, the [c]ourt does not find that to be the case here.
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> Plaintiff's affidavit does not satisfy his burden . . . ; it constitutes mere conclusory allegations and is devoid of detail that would permit the conclusion that there was such conduct or communication of a type or severity that a reasonable person could find that a hostile work environment existed.

We find that the trial court did not err in granting summary disposition regarding Jones's claim of a hostile work environment.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Kurtis T. Wilder